Supreme Court, U.S.
FILED

(1) 96 -7 JUL 1 1996

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

EDWIN WALLACE WHEELER,
Petitioner,

v.

UNITED STATES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MARK A. HUTCHISON,
Counsel of Record

HUTCHISON & STEFFEN
530 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 385-2500

Attorneys for Petitioner

31 pp

QUESTIONS PRESENTED FOR REVIEW

WHETHER A CIVIL CONSENT DECREE SHOULD BE ADMITTED INTO EVIDENCE DURING A CRIMINAL PROCEEDING TO PROVE THE DEFENDANT'S GUILT AND BE CONSIDERED NOT "PREJUDICIAL" IN EVALUATING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES CITED iv

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

REASON FOR ALLOWING THE WRIT 5

THE QUESTION OF WHETHER A CIVIL CONSENT DECREE NOT ADMITTING LIABILITY SHOULD EVER BE ADMITTED INTO EVIDENCE DURING A CRIMINAL PROCEEDING TO PROVE THE DEFENDANT'S GUILT IS AN IMPORTANT QUESTION OF FEDERAL LAW OVER WHICH THE CIRCUITS ARE SPLIT 5

CONCLUSION 13

APPENDIX

Page

Appendix A Unpublished Opinion of the United States Court of Appeals for the Ninth Circuit A-1

TABLE OF AUTHORITIES CITED

CASES — Page

Harrison v. Jones,
880 F.2d 1279 (11th Cir. 1989) 12

Lipsky v. Com. United Corp.,
551 F.2d 887 (2d Cir. 1976) 12

Strickland v. Washington,
466 U.S. 668, 687 (1984) 4, 5, 8, 13

United States v. Austin,
54 F.3d 394 (7th Cir. 1995) 10

United States v. Cohen,
946 F.2d 430 (6th Cir. 1991) 8

United States v. Gonzalez,
748 F.2d 74 (2d Cir. 1984) 8

United States v. Hauert,
40 F.3d 197 (7th Cir. 1994),
cert. denied, 115 S. Ct. 1822 (1995) 9, 10

United States v. Hays,
872 F.2d 582(5th Cir. 1989) 7-11

STATUTES

15 U.S.C. § 77q(a) and 77x 3

18 U.S.C. § 2255 4

28 U.S.C. § 1254(1) 2

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

EDWIN WALLACE WHEELER,
Petitioner,

v.

UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner Edwin Wallace Wheeler respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on April 2, 1996.

OPINIONS BELOW

The memorandum of the United States Court of Appeals for the Ninth Circuit is unreported, but is set out as Appendix A.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its opinion on April 2, 1996. This petition for certiorari was filed within ninety days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1254(1).

STATEMENT OF THE CASE

This case stems from Edwin Wallace Wheeler's ("Wheeler") involvement with a company named CTI Technical, Inc. ("CTI"). On September 15, 1987, CTI filed an Amended Registration Statement, Form S-18, with the Securities and Exchange Commission. The Registration Statement was prepared by Gary Wykidal ("Wykidal"), an attorney in Costa Mesa, California. The prospectus portion of the Amended Registration Statement described the offering as a "Blind Pool/Blank Check" offering, and contained many explicit warnings of the risky nature of the venture.

Sometime prior to August 4, 1989, the Securities and Exchange Commission launched an investigation of CTI. Thereafter, it instituted an action against Wheeler and others seeking injunctive and other declaratory relief. In settlement of the claims contained in that action, Wheeler entered into a civil consent decree, filed August 4, 1989, which, "without admitting or denying the allegations of the Complaint," permitted entry of Final Judgment of Permanent Injunction and Other Declaratory Relief. The civil consent decree contained numerous factual "findings" highly prejudicial to Wheeler.

Among those "findings" were the following: (1) Wheeler was an "undisclosed promoter and control person of CTI from the time of its incorporation in January 1987, until February 1988 when he became Chief Executive Officer of CTI;" (2) the signatures of two of the directors on the registration statement were "forgeries" and Wheeler caused them to be made; (3) the officers and directors were "figureheads" and did not take any actions to run the company. Wheeler made all corporate decisions; (4) Wheeler took all actions to complete the initial offering and after the offering was completed took control of the proceeds; and (5) Wheeler had begun negotiations to acquire a company, which manufactured automobile trailers at the time the prospectus was filed although the prospectus states that no specific projects had been identified.

The civil consent decree stated:

> The Court hereby concludes that these transactions, acts, practices and courses of business constitute violations of Sections 5(b), 6 and 17(a) of the Securities Act of 1933, and Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) [15 U.S.C. secs. 77e(b), 77f(a), 77g(a) and 78j(b)].

Approximately three years after the filing of the civil consent decree, on September 23, 1992, an indictment was returned charging Wheeler with securities fraud under 15 U.S.C. § 77q(a) and 77x. The indictment was based on the same conduct that underlay the earlier civil proceeding. During trial, Wheeler was represented by Dwight Duncan, an attorney then with the Federal Public Defender's Office.

During Wheeler's two day trial, the Government called six witnesses, including Wykidal, the attorney who prepared CTI's Registration Statement. Duncan failed to call a single witnesses on Wheeler's behalf. On the second day of trial, the Government offered its Exhibit 12, the consent decree, which Wheeler executed in the earlier civil action. The consent was admitted without objection by Wheeler's counsel.

Wheeler was convicted and sentenced on July 23, 1993.

Wheeler appealed his conviction, arguing that admission of the civil consent decree in the criminal proceedings was reversible error. Because Duncan failed to object, the Ninth Circuit reviewed the admission on a "plain error" standard. Neither this Court nor the Ninth Circuit had addressed the issue, and the Court noted that other circuits are split on the admissibility of a civil consent decree in a criminal proceeding. Given the split, the Ninth Circuit reasoned, the trial court's admission of the civil consent decree was not "obvious error under present law." The Ninth Circuit, therefore, affirmed Wheeler's conviction.

Wheeler then filed a motion to correct, vacate or set aside an illegal sentence under 18 U.S.C. § 2255. The section 2255 motion was based on ineffective assistance of counsel, and, inter alia, alleged that Duncan performed deficiently in failing to object to admission of the civil consent decree.

The district court agreed that Duncan performed deficiently by failing to object to the introduction of the civil consent decree. However, relying on Strickland v. Washington, 466 U.S. 668 (1984), the deficiency, the district court reasoned,

did not lead to a reasonable probability that, but for the error, the result of the proceedings would have been different. Wheeler's section 2255 motion was denied.

Wheeler appealed the denial of his motion, arguing that Duncan's conduct was deficient and prejudicial and therefore satisfied the familiar standards established by Strickland. The Ninth Circuit, by memorandum order attached as part of the Appendix, held that Duncan's failure to object to the introduction of the consent decree constituted deficient performance. Nevertheless, the court determined that it was not prejudicial.

REASON FOR ALLOWING THE WRIT

THE QUESTION OF WHETHER A CIVIL CONSENT DECREE NOT ADMITTING LIABILITY SHOULD EVER BE ADMITTED INTO EVIDENCE DURING A CRIMINAL PROCEEDING TO PROVE THE DEFENDANT'S GUILT IS AN IMPORTANT QUESTION OF FEDERAL LAW OVER WHICH THE CIRCUITS ARE SPLIT

The Ninth Circuit followed the well-settled test for ineffective assistance of counsel announced in Strickland, which requires a prevailing claimant to show "(1) that his counsel's performance was deficient and (2) that the ineffective assistance prejudiced the defense." 466 U.S. at 687. The Ninth Circuit agreed with the district court's determination that Duncan's performance was deficient because he failed to object to the introduction of the civil consent decree. In the words of the Ninth Circuit, because of the "'highly prejudicial nature' of the decree and its questionable admissibility, we also find it

unreasonable for an attorney not at least to object to its admission." Order at A5. The Ninth Circuit further determined that the consent decree should not have been admitted because it was inadmissible hearsay. "We therefore believe that Wheeler did not admit to these Findings of Fact and that they are therefore inadmissible hearsay." Order at A5 n.3, A6.

Nevertheless, the court held that the admission was not prejudicial.

> We have reviewed the record below and find that the government elicited the same facts contained in the decree from its witnesses at trial. Because the same facts would have been before the jury even if the decree had been excluded, we find 'no probability' that the result of this trial would have differed if Duncan had objected to the decree's admission.

Order at A6.

The Ninth Circuit's decision underscores the importance of granting a writ of certiorari in this case. Circuit courts are split over the issue of admitting a consent decree to prove guilt. The introduction of a civil consent decree should never be admitted to prove a defendant's guilt because it is, by its very nature, prejudicial. The Ninth Circuit, contradicting its own holding, recognized the problem when it held that counsel performed deficiently in failing to object to the admission of the decree given its "highly prejudicial nature." Order at A5 (emphasis added).

The district court recognized that the jury would not have convicted Wheeler absent admission of the civil consent decree. It stated that "the impact on the jury of the civil consent

decree is obvious..." In fact, the decree contained the following "conclusion of law":

> The Court hereby concludes that these transactions, acts, practices and courses of business constitute violations of Section 5(b), 6 and 17(a) of the Securities Act of 1933, and Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. §§77e(b), 77f(a), 77q(a), 78j(b), and 78o(d)]. . . .

If the point was lost on any of the jurors, the Government informed them that Wheeler was charged with violating precisely the same statute that the civil consent decree stated he violated.

During closing argument the Government spoke of little besides the civil consent decree, telling the jury to disregard all testimony and to focus on the decree since it was an admission of guilt. The attorney for the Government told the jury, "You don't need a live witness to tell you that. . . look inside the consent judgment." Absent the admission of the decree, the Government would have been unable to carry its burden. As in United States v. Hays, 872 F.2d 582, 589 (5th Cir. 1989), "[i]t does not tax the imagination to envision the juror who retires to deliberate with the notion that if the defendants had done nothing wrong, they would not have paid the money back," or, in this case, that the defendant would not have allowed entry of an injunction against himself.

The circuit courts are split on whether civil consent decrees are admissible in criminal proceedings. Indeed, the Ninth Circuit, ruling on Wheeler's appeal from his conviction, underscored this point:

> Neither the Supreme Court nor this court has discussed whether civil consent decrees are admissible in criminal proceedings, or the applicability of Fed. R. Evid. 408 to a document offered to show a party admission or to prove that a crime has been committed. Other circuits are split on this issue. Compare United States v. Cohen, 946 F.2d 430, 435 (6th Cir. 1991) and United States v. Gonzalez, 748 F.2d 74, 78 (2d Cir. 1984) with United States v. Hays, 872 F.2d 582 (5th Cir. 1989). Therefore we cannot say that receiving the stipulation and consent judgment was obvious error under present law.

For several reasons, including the differing burdens of proof in civil and criminal trials, the fact that the civil consent decree reflects a settlement between the parties or, in effect, a plea of nolo contendere, and the fact that it was introduced solely to prove Wheeler's liability and not for any tangential issue, the Court should issue a writ of certiorari to make clear to the lower courts that civil consent decrees are inadmissible in criminal proceedings and prejudicial for purposes of the Strickland analysis.

The Second and Sixth Circuit have approved the admission of civil consent decrees or statement made during negotiations concerning them. In United States v. Gonzalez, 748 F.2d 74, 78 (2d Cir. 1984), the Second Circuit allowed admission of the defendant's statement, made during negotiations for settlement of the civil suit, that a bank note was forged.[1] United States v. Cohen, 946 F.2d 430, 435 (6th Cir.

---

[1]In contrast, Wheeler never made any incriminatory statement or admission. The Consent and Stipulation that he signed clarified that he neither admitted nor denied the findings of fact.

1991) held that a consent decree was admissible in a later criminal prosecution because the Court thought "that Cohen's consent judgment can be characterized better as a personal admission properly admissible under Federal Rule of Evidence 801(d)(2)(A) than as a civil judgment resulting from a jury or bench verdict."

The Fifth Circuit, in United States v. Hays, 872 F.2d 582 (5th Cir. 1989), held, by unanimous decision, that Federal Rule of Evidence 408 did not permit introduction of evidence of civil settlements in a criminal trial.

> [T]he Government urges that evidence of the settlement agreement assisted the jury in its understanding of the breadth of the conspiracy. In our view, the purpose stands at direct odds with the clear mandates of Rule 408, and therefore the admission of the evidence regarding the settlement agreement between Hays and Lancaster was error.

Id. at 589.

The Seventh Circuit has adopted Hays. In United States v. Hauert, 40 F.3d 197 (7th Cir. 1994), cert. denied, 115 S. Ct. 1822 (1995), the Court held that documents signed by the defendant during the course of negotiating with the Internal Revenue Service were admissible in his criminal prosecution for tax evasion, but only because the settlement documents were admitted to show that the defendant "knew what the law is and his legal duty thereunder." Id. at 200. The Hauert court did not allow the documents to be admitted to prove liability. In fact, the Hauert case cited Hays with approval, and took great care to demonstrate that the facts in Hays were distinguishable from those in Hauert.

United States v. Austin, 54 F.3d 394 (7th Cir. 1995), is similar to Hauert. The Austin court stated:

> Prior to trial, the government informed Austin that it would introduce the [civil] consent decree in order to show Austin's criminal intent in subsequently violating its conditions. While Federal Rule of Evidence 408 prohibits the admission of statements made in the course of settlement to prove liability and Rule 404(b) prohibits the admission of other wrongs in order to show conformity therewith, both rules allow the admission of such evidence when offered for another purpose.

54 F.3d at 400 (emphasis added).

The Fifth Circuit has explicitly prohibited the admission of civil consent decrees in criminal prosecutions to demonstrate liability. The Seventh Circuit, while issuing no case directly on point, has approved the Fifth Circuit's Hays decision. In contrast, a divided panel of the Sixth Circuit held that such consent decrees are admissible, but that case languishes uncited by any court. The better reasoned approach is that of the Fifth and Seventh Circuits.

The policies behind Rules 408 and 410 of the Federal Rules of Evidence support exclusion of the civil consent decree and that it is prejudicial. Federal Rule of Evidence 408 provides, in part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to

> compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

The civil consent decree, the product of a settlement agreement between Wheeler and the SEC, should not be admitted under Federal Rules of Evidence 408; its prejudicial effect is obvious. Hays, 872 F.2d at 589, dismissed the Government's argument that, in that case, "evidence of the settlement agreement assisted the jury in its understanding of the breadth of the conspiracy," finding that:

> In our view, this purpose stands at direct odds with the clear mandates of Rule 408, and therefore the admission of the evidence regarding the settlement agreement between Hays and Lancaster was error.

Id. at 589.

Federal Rule of Evidence 410 states, in relevant part:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> (1) a plea of guilty which was later withdrawn;
>
> (2) a plea of nolo contendere;

> (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing plans;
>
> (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

Consent decrees, like the one in the present case, have been compared to pleas of nolo contendere for the purpose of admissibility. In Lipsky v. Com. United Corp., 551 F.2d 887, 894 (2d Cir. 1976), the Court explained, "The reason for this equivalency is that both consent decrees and pleas of nolo contendere are not true adjudications of the underlying issues. . . ." See also Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989) ("Counsel's failure to object to the introduction of petitioner's [pleas of nolo contendere] clearly falls outside the range of professionally competent assistance.").

In sum, civil consent decrees should not be admitted into evidence during a criminal proceeding to prove the defendant's guilt. The different levels of proof required to show civil liability and criminal guilt make the introduction of civil judgments unfairly prejudicial. Moreover, when two civil litigants settle their differences through a consent decree, the rationale underlying Rule 408 of the Federal Rules of Evidence prevents introduction of that decree at a later trial. Finally, Rule 410 of the Federal Rules of Evidence forbids introduction of a plea of nolo contendere in any criminal proceeding, and the civil consent decree at issue here is the equivalent of a nolo contendere plea. Any introduction of a consent decree must be

viewed as prejudicial in evaluating the prejudice standard set forth in Strickland.

CONCLUSION

For these reasons, the Court should issue a writ of certiorari to the Ninth Circuit Court of Appeals.

Respectfully submitted,

HUTCHISON & STEFFEN

By: MARK A. HUTCHISON

Attorneys for Petitioner

APPENDIX

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
v.)
EDWIN WALLACE WHEELER,)
Defendant-Appellant.)
)

No. 95-15852
D.C. No. CR-92-0028-LDG (RLH)

MEMORANDUM**

Appeal from the United States District Court
for the District of Nevada
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted February 16, 1996
San Francisco, California

Before: HUG, Chief Judge, and HALL and FERNANDEZ, Circuit Judges.

Edwin Wallace Wheeler filed a writ of habeas corpus attacking his convictions of securities violations under 15 U.S.C. §§ 77q(a), 77x. Wheeler claims that he was denied effective assistance of counsel because his attorney, Dwight

---

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Duncan: (1) did not object to the admission of a consent decree Wheeler had previously entered into with the SEC; (2) did not cross-examine a government witness; (3) did not consult or hire an expert witness to describe the nature of "blind pool" corporations to the jury; and (4) did not object to factual inaccuracies contained in Wheeler's presentence report. When the district court denied his writ, he appealed. We affirm.

I.

In 1987, Edwin Wallace "Bud" Wheeler became involved with a company named CTI Technical, Inc. ("CTI"). CTI wished to have a public stock offering and Wheeler hired Gary Wykidal, a California attorney, to prepare an Amended Registration Statement, Form S-18, which Wheeler later filed with the Securities and Exchange Commission ("SEC"). The Registration Statement contained a prospectus, in which CTI disclosed that it was a "blind pool" corporation -- a type of corporation which has not yet started to operate; the stock offering was designed to raise money with which CTI would attempt to acquire other companies. The Registration Statement listed Kent Midby, Donald Dorsey, and Marnell Binkley as officers and directors of CTI. The Statement did not disclose that Wheeler was a promoter of the corporation. As a result of the public offering, CTI raised $139,000.

In 1987, the SEC began to investigate Wheeler and CTI. This investigation culminated in a civil consent decree between Wheeler and the SEC. Wheeler signed a Consent and Stipulation, which was incorporated into the Final Judgment; the Final Judgment contained a number of "Findings of Fact."[2]

---

[2]Unless referred to specifically, the Final Judgment, the Consent and Stipulation, and consent Decree will be hereafter referred to as the "consent decree."

Many of these Findings were prejudicial to Wheeler: (1) that Wheeler failed to disclose that Midby, Dorsey, and Binkley were mere figureheads in CTI; (2) that Wheeler had forged their signatures on the Registration Statement; and (3) that Wheeler failed to disclose he was a promoter of CTI.

Three years later, the SEC instituted criminal proceedings against Wheeler, charging him with violations of 15 U.S.C. §§ 77q(a), 77x for failure to disclose material information in CTI's Registration Statement. Dwight Duncan, a public defender, was appointed as his counsel. In the course of the two-day trial, the government introduced the consent decree (and its Findings of Fact) into evidence; Duncan did not object. Nor did Duncan hire an expert witness to explain the nature of "blind pool" corporations to the jury. Wheeler was convicted.

The presentencing report prepared thereafter noted that Wheeler's involvement in CTI adversely harmed many of CTI's investors. Because the civil consent decree effectively stated that no people were harmed, Wheeler urged Duncan to object to this factual inaccuracy in the report. Although Duncan did so in a pre-hearing memorandum, he did not do so at the sentencing hearing. When the judge asked Wheeler and Duncan at the hearing whether the report contained inaccuracies, both replied, "No." After a separate appeal of the sentence, Wheeler was sentenced to five years incarceration, with all but six months suspended, and three years probation.

Wheeler filed a petition for a writ of habeas corpus in the district court, claiming that Duncan provided ineffective assistance of counsel on four different grounds. When the district court rejected all of his claims, this timely appeal followed.

II.

Wheeler first claims that Duncan's failure to object to the admission of the civil consent decree rendered his assistance ineffective. We review claims of ineffective assistance of counsel, as well as the denial of a habeas corpus petition, de novo. Sanchez v. United States, 50 F.3d 1448, 1456 (9th Cir. 1995) (ineffective assistance); Moran v. Godinez, 57 F.3d 690, 695 (9th Cir. 1994), cert. denied sub nom., Moran v. McDaniel, 116 S. Ct. 479 (1995) (denial of habeas).

To prevail on a claim of ineffective assistance of counsel, a defendant must show "(1) that his counsel's performance was deficient and (2) that the ineffective assistance prejudiced the defense." Sanchez, 50 F.3d at 1456 (citations omitted); Strickland v. Washington, 466 U.S. 668, 687 (1984). Performance is judged from an "objective standard of reasonableness," evaluated "from the counsel's perspective at the time [of the alleged error]" so as to avoid "the distorting effects of hindsight." Strickland at 688-89. Because deficient performance encompasses only "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," id., 466 U.S. at 687, "the court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689 (emphasis added); Wade v. Calderon, 29 F.3d 1312, 1316 (9th Cir. 1994), cert. denied, 115 S. Ct. 923 (1995) (noting strong presumption of competence). A defendant is not prejudiced by deficient performance unless "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694 (emphasis added).

Wheeler argues that Duncan's failure to object was objectively unreasonable because the consent decree was hearsay and because the Ninth Circuit had not yet decided whether the decree would be admissible in these circumstances

under Federal Rule of Evidence 408.[3] The district court agreed with Wheeler. Due to the "highly prejudicial nature" of the decree and its questionable admissibility, we also find it unreasonable for an attorney not at least to object to its admission.

Wheeler contends that this deficiency prejudiced him, reasoning (1) that if Duncan had objected, the decree would not have been admitted; and (2) that if the decree had not been admitted, he would have been acquitted inn light of the government's heavy reliance on the decree when proving guilt. The district court concluded that Wheeler's first proposition was incorrect since the decree was an not hearsay and since two of the three Circuits which had considered the admissibility of such decrees under Rule 408 would have admitted it. Wheeler contests this ruling and asks us to decide these evidentiary issues so as to establish prejudice.

Wheeler mounts a two-prong attack on the admissibility of the consent decree.[4] He first claims that he did not admit to the Findings of Fact contained in the consent decree and that these Findings cannot therefore be the admissions of a party opponent under Federal Rule of Evidence 801(d)(2). Fed. R. Evid. 801(d)(2). We agree. Both the Consent and Stipulation and the Final Judgment unequivocally state that Wheeler neither admitted nor denied the allegations in the SEC's complaint. Although Wheeler in the same documents also consented to the Findings of Fact (or to their entry), we cannot help but observe

---

[3]Indeed, the Circuits that have decided the Rule 408 issue have split.

[4]Because we conclude that the decree is inadmissible hearsay, we need not address the second prong, Wheeler's claim that the decree is inadmissible under Rule 408.

that the Findings were lifted almost verbatim from the SEC's complaint. We think it somewhat strange to say that a person who specifically neither admits nor denies the allegations of the complaint against him nevertheless admits the exact allegations in the form of a consent decree. It its stranger that the person does so in the selfsame document. We therefore believe that Wheeler did not admit to these Findings of Fact and that they are therefore inadmissible hearsay.

While we can thus agree with the first proposition Wheeler uses to establish prejudice -- that Duncan's objection to the decree's admission would have resulted in its exclusion -- we cannot agree with his second proposition that the decree's admission was prejudicial. We have reviewed the record below and find that the government elicited the same facts contained in the decree from its witnesses at trial. Because the same facts would have been before the jury even if the decree had been excluded, we find no "reasonable probability" that the result of this trial would have differed if Duncan had objected to the decree's admission. Wheeler's first ineffective assistance claim therefore fails.

III.

Wheeler further claims that Duncan, had he cross-examined Wykidal, would have elicited two facts: (1) that Wykidal was inexperienced at preparing Registration statements; and (2) that Wheeler relied on Wykidal's advice as an attorney. These facts, Wheeler claims, would have developed his defense of reliance on counsel and would have dispelled the government's theory that Wheeler choose Wykidal because Wykidal was inexperienced.

The record does not support -- and in fact undermines -- Wheeler's claim. Both the government's attorney in direct

examination, and Duncan in cross-examination, raised the issue of Wykidal's inexperience in securities law. Duncan also cross-examined Wykidal about Wheeler's reliance on Wykidal's advice. Duncan even argued this evidence in his closing argument in support of the good faith defense. Because Duncan actually asked the questions and elicited the facts Wheeler claims he did not, Duncan's performance was competent and Wheeler could not have been prejudiced by the absence of these facts.

IV.

Wheeler next argues that Duncan should have called an expert witness to testify that a "blind pool" corporation is a legitimate type of corporation, which would have countered the government's assertion that such corporations were inherently "nefarious" and would have supported Wheeler's argument that it was permissible for such a corporation's officers to have little or no involvement in the corporation.

The failure to call an expert witness can be grounds for a successful ineffective assistance of counsel claim. In United States v. Tarricone, 996 F.2d 1414 (2d Cir. 1993), the defendant's attorney never consulted a handwriting expert, who might have proven that the defendant never signed the "throughput agreement" at issue in the case. During the trial, the agreement was "important to the jury" and testimony that the defendant never signed the agreement would have cast doubt on the credibility of two other witnesses. The court held that the defendant had a "viable" claim of ineffective assistance warranting an evidentiary hearing, citing "the primary reason for our conclusion [as] the significance attached to the handwriting on the throughput agreement throughout the trial." Id. at 1419. Similarly, in Sims v. Livesay, 970 F.2d 1575 (6th Cir. 1992), the defendant's attorney did not hire an expert to analyze the bullet

holes and powder patterns on the quilt a homicide victim held in her hands at the time of her shooting; an expert's analysis would have revealed the distance between the gun and her body at the time of the shooting and might have supported the defendant's contention that the shooting was accidental. The court found his counsel ineffective. Id. at 1580-81.

Although these cases illustrate a claim like Wheeler's can be successful, it is not so on the facts of this case. Here, Duncan actually elicited the testimony Wheeler claims was missing from another witness, Wykidal. Wheeler is therefore left arguing that this same testimony should have come from a separate expert witness. This is untenable. Even if we assumed for the sake of argument that this proposition had merit, Wheeler's claim would still fail. Unlike the expert testimony in Tarricone and Livesay which would have addressed the very heart of the defendant's guilt in a case, the testimony about "blind pool" corporations in this case would be "background orientation" to corporate organization. Wheeler was not convicted for running a particular type of corporation -- he was convicted on committing acts of nondisclosure; testimony about the former would seem to have little bearing on the latter. Thus, it is doubtful that such expert testimony would have altered the outcome of the proceeding and its absence was not therefore prejudicial.

V.

Wheeler lastly argues that Duncan's assistance was ineffective because Duncan did not object at the sentencing hearing to the victim impact portion of the presentence report. Wheeler claims that the consent decree from the prior civil case established that no investor was harmed by his activities, so that the presentence report showing harm to victims was factually inaccurate and should have been challenged by Duncan.

Wheeler claims Duncan's performance was deficient because Duncan had a duty under ABA Standard for Criminal Justice Prosecution Function and Defense Function Standard 4-8.1(b) to "verify" and "challenge" information contained in a presentence report. However, it is well established that the ABA standards are only a "guide" -- and are not dispositive of reasonable performance. Jeffries v. Blodgett, 5 F.3d 1180, 1198 (9th Cir. 1993), cert. denied, 114 S. Ct. 1294 (1994) ("[T]he ABA Standards . . . serve only as a 'guide' for determining whether an attorney's performance is adequate.") (citations omitted); Strickland, 466 U.S. at 688 ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides."). Moreover, Duncan submitted a written memorandum to the sentencing judge objecting to the victim impact section of the presentencing report; the sentencing judge assured Wheeler that he had considered this memorandum when imposing the sentence. Although at the hearing Duncan stated that the report contained no factual inaccuracies, Duncan maintained that restitution was inappropriate because no people were harmed by Wheeler's acts. While Duncan's concession of no inaccuracy may have been unwise, his memorandum and repeated efforts to interject the fact that no victims were harmed do not make his representation unreasonable.

Wheeler further asserts that the failure to object to the presentence report prejudiced him. He cites Spriggs v. Collins, 993 F.2d 85 (5th Cir. 1993), which sets forth the Fifth Circuit's standard for evaluating "prejudice" at non-capital sentencing hearings: "[A] court must determine whether there is a reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh." Id. at 88. Under Spriggs, the court should consider: (1) the actual sentence imposed; (2) the minimum and

maximum sentences available; (3) the relative placement of the defendant's sentence within the range of available sentences; and (4) mitigating and aggravating factors considered by the judge. Id. Under this test, Wheeler claims he has been prejudiced.

Wheeler's argument is without merit. To begin with, the Ninth Circuit has not adopted Spriggs and continues to use the regular Strickland test.[5] Under the regular Strickland standard, Wheeler did not suffer prejudice. Duncan submitted a memorandum to the court objecting to the factual inaccuracies, which the sentencing judge considered; Duncan's failure to object at the hearing, when he had already objected in the memorandum, would not have changed the outcome. Wheeler also stated in court that he agreed with Duncan that the presentence report contained no factual inaccuracies; although Wheeler now claims he was confused when he made this concession, the transcript makes this difficult to believe.

Wheeler's claims would fail even under the Spriggs analysis. Wheeler was sentenced to five years imprisonment, with all but six months suspended, and three years probation. The incarceration period ranged from no time to five years; the probation period ranged from one to five years. Given that Wheeler was incarcerated for almost the minimum, it seems unlikely his sentence would have been "significantly less harsh" if the one-page victim impact passage in the 15-page presentencing report had been accurate.

---

[5]However, the Tenth Circuit has adopted Spriggs. See United States v. Kissick, 69 F.3d 1048, 1056 (10th Cir. 1995). The Seventh Circuit employs a similar test, looking to whether the effect on the sentence was sufficiently large. See Durrive v. United States, 4 F.3d 548 (7th Cir. 1993).

Because Duncan's performance was not deficient and because Wheeler suffered no prejudice under either the general Strickland or more specific Spriggs standards, this claim also fails.

AFFIRMED.